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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 102

HOTPOINT COMPANY, A DIVISION OF GENERAL ELECTRIC COMPANY, A NEW YORK CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 121-127) is reported at 117 F. Supp. 572.

JURISDICTION

The order of the Court of Claims dismissing petitioner's claim was entered on January 5, 1954 (R. 121). A motion for rehearing was filed on February 1, 1954, and was overruled on March 2, 1954

(R. 128-129). The petition for a writ of certiorari was filed on May 28, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the petitioner is entitled, under the terms of a cost-plus-fixed-fee contract for the manufacture of ordnance material, to be reimbursed by the Government for contributions to charity made during the life of the contract.

CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the contract are these:

> TITLE II
>
> Operation of Plant
>
> Article II-A—Statement of Work.
>
> * * * * *
>
> 6. In carrying out the work under this Title II the Contractor is authorized to do and shall do all things necessary or convenient in the operating and closing down of the Project, or any part thereof, * * *.
>
> * * * * *
>
> TITLE III
>
> Cost of the Work and Payment Therefor
>
> Article III-A—Reimbursement for Contractor's Expenditures.

1. The Contractor shall be reimbursed in the manner hereinafter described for such of its actual expenditures in the performance of the work under this contract, as may be approved or ratified by the Contracting Officer, and as are included in but not limited to the following items;

* * * * *

Extra compensation to employees, discontinuance wages and a proper proportionate share of costs of maintenance of welfare, pension and other employee relations plans maintained by the Contractor; Provided, that the Government shall be chargeable therefor only insofar as the same are consistent with the general employee relations policies existing throughout the Contractor's organization, or are incurred pursuant to agreement made as a result of collective bargaining with the representatives of employees, or are expressly authorized in writing by the Contracting Officer.[1]

* * * * *

General.

* * * * *

5. No salaries of the Contractor's corporate executive officers, no part of the expense in-

[1] This section has been amended several times, but since the amendments do not affect the dispute in this case the original terms of the contract are used.

curred in conducting the Contractor's main office or regularly established branch offices, and no overhead expenses of any kind, except as otherwise specifically provided herein, shall be included in the cost of the work under this contract; nor shall any interest on capital employed or on borrowed money be included in the cost of the work.

* * * * *

STATEMENT

On March 18, 1942, the parties entered into cost-plus-fixed-fee contract No. W-ORD-632 for the installation and operation of an ordnance facility at plaintiff's Cicero, Illinois plant, to produce caliber .30 and caliber .50 armour piercing cores (R. 8-50).

Petitioner now seeks reimbursement by the Government for contributions of $18,934.88 which it made to the American Red Cross and similar charities during the life of the contract. This sum represents that portion of petitioner's total contribution to these charities which it "allocated" to this contract on the basis of the number of its employees working on the contract. Petitioner's request for reimbursement for these contributions as an item of cost of peforming the contract was denied by the contracting officer (R. 102-105) and this decision was affirmed by the Appeal Board, Office of Contract Settlement (R. 106-111).

Petitioner then brought suit for this sum in the Court of Claims, which on stipulated facts granted

the Government's motion for summary judgment and dismissed the petition (R. 121-127).

ARGUMENT

1. The contract between the parties expressly provides that, unless otherwise specifically authorized, "no overhead expenses of any kind" shall be considered reimbursable costs. Article III-A, 5, *supra*, p. 4. Petitioner's charitable contributions clearly constitute overhead expenses, and as such are not subject to reimbursement.

Under well-settled principles of law, charitable contributions generally—if recognized as expenses of a business—must be regarded as overhead expenses. The operating charges—that is, the only items which do not constitute overhead expenses—are those items inseparably connected with the productive end of the operation, which may be seen as the work progresses, and are the subject of knowledge from observation. This in essence is the classic definition formulated in *Lytle, Campbell & Co.* v. *Somers, Fitler & Todd Co.*, 276 Pa. 409, 120 A. 409. Conversely, W. A. Paton's *Accountants' Handbook*, 3rd Edition, p. 215, defines overhead as follows:

> Overhead or burden includes all costs which are not capable of being directly charged to the product; in other words it includes everything except direct labor and direct materials.

Petitioner contends that in the electrical industry charitable contributions are not considered overhead expenses, referring to a *Uniform Ac-*

counting Manual for the Electrical Industry [Plaintiff's Exhibit 6, in the Court of Claims] which characterizes charitable contributions as "indirect manufacturing costs". But we submit that, to the extent that this manual may vary the generally accepted conception of overhead, it cannot control the interpretation of this contract. For when the terms of the contract are as clear as those in this case, and are susceptible of application in accordance with the well-established legal concept of overhead, there is no justification whatever for introducing evidence of an alleged special practice to vary the terms of the contract. *Restatement, Contracts,* Sec. 247; Williston, on *Contracts,* Rev. Ed. 1936, Sec. 661. This is particularly true where, as here, there is no evidence that the Government knew of the existence of this alleged practice of the industry or consented to be bound by it in contravention of the generally accepted accounting concept of overhead. Nor is there any reason why the Government should be bound by a practice of the electrical manufacturing industry in contracting for the equipment and operation of an ordnance facility for the production of dowel pins and armour piercing cores.

But even if this manual were to serve as a guide to the interpretation of the contract, it would not change the classification of charitable contributions as overhead. For while the manual states that charitable contributions are "indirect manufacturing expenses", it also includes in this category

such clearly accepted overhead expenses as depreciation, insurance, heat, light, and power; and the manual makes it clear that indirect manufacturing expenses are but a part of overhead, by defining "shop overhead" to include "indirect manufacturing expenses which are incurred in the operation, maintenance and administration of manufacturing activities". As the court below found (R. 124), "It therefore appears that the manual makes no distinction between indirect manufacturing expenses and manufacturing overhead".

Nor, of course, does the fact that petitioner chose to compute the amount of its contributions on the basis of the number of workers employed transmute these contributions into direct manufacturing costs. This system "simply provided a method of allocation, not a reason for it" (Opinion of Board of Appeals, O.C.S.; R. 110.) As the Court of Claims pointed out (R. 125), "charitable contributions are made by a corporation in the exercise of discretion by the Board of Directors or proper officers, primarily for public relations purposes and are based on ability to contribute and the need of the charity, as distinguished from a necessary cost of production". They are in no sense "inseparably connected with the productive end" as required of operating charges by the *Lytle, Campbell* case, *supra,* p. 5.

In short, under all generally accepted rules of accounting procedure, charitable contributions can only be considered overhead expense. And the provision of Article III-A, 5 that "no overhead

expenses of any kind" can be included in the cost of the work under the contract seems to be as unqualified and all-inclusive as language can make it. This clause obviously was intended to make clear that under petitioner's cost-plus-fixed-fee contract "cost" included only the direct manufacturing costs, and that all overhead expenses, including, we submit, any charitable contributions that petitioner chose to make, were to be covered by the fixed fee.

2. There is no clause in the contract specifically excepting charitable contributions from the provision with respect to overhead.

a. Petitioner argues that these contributions are reimbursable under the terms of Article II-A, 6, which authorizes the contractor to do all things "necessary or convenient" in the operation of the project. But, even aside from the fact that there is no showing that these contributions were reasonably necessary to the performance of the contract work and that the Government was benefited thereby, it is not Article II, which pertains only to the statement of the work to be done, but Article III, the reimbursement section of the contract, which determines whether these contributions are a reimbursable item of cost.

b. The provision for reimbursement of the "costs of maintenance of welfare, pension and other employee relations plans maintained by the Contractor" (Article III-A, 1 (l), *supra,* p. 3) does not include charitable contributions.

The Red Cross and Community Fund, while serving an indispensable community function, were

performing *public* welfare work, as distinguished from employee welfare work. Any benefits derived by petitioner's employees were strictly incidental in so far as the public welfare programs of these organizations were concerned. The language of the clause itself makes clear that the Government was consenting to liability only for payment incident to the welfare of *employees as employees,* and that this clause contemplates the type of benefit that employees might ordinarily seek to make the subject of collective bargaining: "extra compensation to employees, discontinuance wages * * * pension(s) * * *" (Article III-A, 1, (l)). In any event, whatever the benefit of these contributions to petitioner's employees, it certainly cannot be said that by contributing to the Red Cross or Community Fund, petitioner was contributing to an employee relations plan *"maintained by the contractor"* as required by the contract.

c. Lastly, petitioner contends that nevertheless it is the existing practice of the Government in administering such contracts to treat charitable contributions as reimbursable costs. But this is true only of those contracts expressly incorporating Treasury Decision 5000, which provides *inter alia* for the reimbursement of "contributions to local charitable or community organizations to the extent constituting ordinary and necessary business expenses * * *." Cf. *Federal Cartridge Corp.* v. *United States,* 111 C. Cls. 373; *John H. Mathis Co.* v. *United States,* 79 F. Supp. 703 (D. N.J.; *Hudson Motor Car Co.* v. *Navy,* 2 App. Bd. O.C.S.

No. 134; *Consolidated Vultee Aircraft Corp.*, Army B.C.A. No. 1594. In petitioner's contract, not only is there no reference to Treasury Decision 5000, but the parties expressly included a provision of almost directly opposite effect, Article III-A, 5.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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